

United States Senate

WASHINGTON, DC 20510

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Competition
Media
Ownership

The Honorable Thomas E. Wheeler
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

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Dear Chairman Wheeler:

In March 2014, the Federal Communications Commission (FCC) adopted a further notice of proposed rulemaking (FNPRM) to solicit additional comment on whether it should eliminate or modify its network non-duplication and syndicated exclusivity rules (exclusivity rules). On August 12, you wrote that you were putting forth an order that would eliminate both rules. We write to express concern about your proposal to eliminate these long-standing rules in the absence of complementary statutory reform of the compulsory copyright laws.

The cable compulsory copyright license is designed to work in tandem with the FCC's exclusivity rules. As the FCC noted in the 2014 FNPRM, the Copyright Act was amended by Congress to provide a compulsory license under which cable systems may retransmit the signals of all local broadcast stations and distant broadcast stations to the extent that carriage of such distant stations is permitted under FCC rules. Eliminating these rules without making corresponding changes to the compulsory copyright license system will potentially alter the way in which the cable compulsory copyright license is intended to function and disrupt local television businesses and viewing households.

Recognizing the interrelated nature of communications and copyright law in this area, Congress and the FCC have previously worked together with stakeholders to craft a comprehensive and consensus approach to governing the retransmission of broadcast signals and copyrighted content by cable systems. This approach produced a regime that has both successfully fostered the growth of the cable industry and ensured the continued viability of the local broadcast system. To the extent that this regime is now outdated, any reassessment of it should be done in a similarly coordinated and comprehensive manner.

Our committees have long acknowledged the close interplay between the compulsory copyright license system and the Communications Act. We have worked together to reauthorize and amend key provisions of each when called for. We feel it would be premature for the FCC to repeal the exclusivity rules while the current compulsory copyright license regime remains unchanged. We ask that the FCC cooperate with our committees to identify an approach that appropriately balances both copyright and communications regulation.

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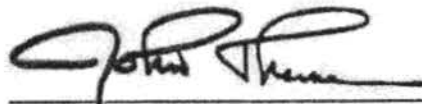
Sincerely,



CHARLES E. GRASSLEY

Chairman

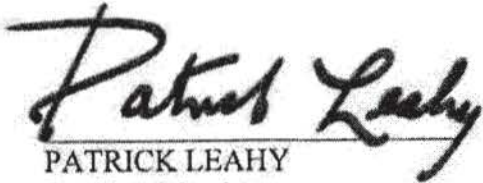
Committee on the Judiciary



JOHN THUNE

Chairman

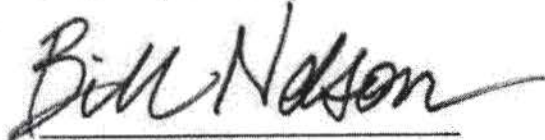
Committee on Commerce, Science,
and Transportation



PATRICK LEAHY

Ranking Member

Committee on the Judiciary



BILL NELSON

Ranking Member

Committee on Commerce, Science,
and Transportation

cc: The Honorable Mignon Clyburn
The Honorable Michael O'Rielly
The Honorable Ajit Pai
The Honorable Jessica Rosenworcel



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

November 10, 2015

The Honorable Charles E. Grassley
Chairman
Committee on Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Grassley:

Thank you for your recent correspondence expressing your concern about the proposal to eliminate the existing non-duplication and syndication exclusivity rules in the absence of complimentary statutory reform of the compulsory copyright laws. Your views will be entered into the record of both our ongoing retransmission consent and exclusivity proceedings.

Congress instructed the Commission in the Satellite Television Extension and Localism Act Reauthorization Act (STELAR) to open a proceeding to examine the "totality of circumstances" involved in retransmission consent negotiations. The purpose of this proceeding, which is ongoing at the Commission, is to examine both forces that act to drive up cable rates and the ability of consumers to fairly access video programming. An integral part of any review of the retransmission consent regime is consideration of the Commission's exclusivity rules.

As you are aware, consumers are often the victims of retransmission disputes. Frequent press accounts have highlighted that the negotiations between broadcasters and cable operators over retransmission rights often result in program blackouts where cable consumers are denied the ability to see a particular channel until the dispute is resolved. The Commission's exclusivity rules serve to exacerbate this problem for consumers by prohibiting the importation of distant signals, as well as strengthen the position of broadcasters in retransmission disputes, thereby constituting a distortion of free market processes.

In the early days of the cable industry, cable companies often supplemented their programming with signals imported from distant broadcasters. Congress provided a compulsory copyright license for the programming carried on the distant signals with an important condition: that the signals and their constituent programming would only be covered by the compulsory license if the importation of the distant signals were consistent with FCC rules. This statutory provision, codified at 17 U.S.C. 111 and 119, is the reason that the FCC exclusivity rules have any relevance today.

A great deal has changed since the compulsory copyright law was enacted. Two things seem especially relevant: private contracts between and among programmers, networks, and broadcasters typically include exclusivity provisions; and, in 1992, Congress passed

retransmission consent legislation giving broadcasters the right to negotiate with cable and DBS companies over the right to transmit their signals.

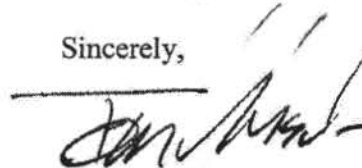
There are many who argue that retransmission fees drive up consumers' cable bills without any corresponding benefit. Indeed, some broadcasters have told Wall Street they expect continuing double digit increases in the retransmission fees they charge cable companies. These fees, of course, are ultimately paid by consumers.

An elimination of the exclusivity rules is unlikely to have an immediate effect on programmers, broadcasters, cable companies, or consumers. This is because, as noted, current broadcast program contracts and network affiliation agreements normally contain their own exclusivity provisions prohibiting a program from being imported into a market if it is being shown on a local broadcast station. In these circumstances, retaining the exclusivity provisions may well be redundant and a federal intrusion, without cause, into the marketplace.

Faith in the free market would suggest that government get out of the way, absent an indication of harm. Since the rules appear redundant to existing contractual provisions based on the record, their elimination would not be the trigger for such harm. However, the presence of the exclusivity rules prohibits the market from operating in a fair and efficient manner and aggravates the harm to consumers during retransmission consent disputes. Simply put, there is a possibility that the exclusivity rules protect broadcasters from the marketplace by substituting an anti-market government mandate and in the process contribute to high cable and DBS prices.

I appreciate your thoughtful input on this issue. I am sure it will continue to be discussed as we pursue Congress's mandate on retransmission consent negotiations.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom Wheeler", with a horizontal line drawn above it.

Tom Wheeler